Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request for	)	
	)	
Declaratory Ruling Regarding	)	CC Docket No. 99-143
the Use of Section 252(i) to Opt Into	)	
Provisions Containing	)	
Non-Cost-Based Rates	)	

JOINT COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, CHOICE ONE COMMUNICATIONS INC., FOCAL COMMUNICATIONS CORPORATION AND HYPERION TELECOMMUNICATIONS, INC.

Richard M. Rindler
Kemal M. Hawa
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007-5116
(202) 424-7500

Counsel for Joint Commenters

May 17, 1999

TABLE OF CONTENTS

Summary

Joint Commenters urge the Commission to reject GTE's Petition since it violates the express language of Section 252(i) of the Act and the Commission's Rules, is a transparent attempt to undermine state decisions regarding reciprocal compensation for ISP traffic, is frivolous with respect to switching rates, and is merely an attempt to delay CLECs from obtaining the interconnection agreements to which they are entitled.

Section 252(i) states that incumbent LECs "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." GTE asks this Commission to ignore Section 252(i)'s express language and hold that incumbent LECs need not make available the terms of previously approved interconnection agreements to requesting CLECs. GTE's request stands in direct violation of Section 252(i), and accordingly must be rejected.

GTE's Petition is really a transparent attempt to undermine state commission decisions regarding reciprocal compensation for ISP traffic. Thirty one (31) state commissions have considered the issue of CLEC rights to receive reciprocal compensation for ISP traffic, and each has decided that reciprocal compensation should be paid for such traffic under existing interconnection agreements. GTE now seeks to limit those decisions to the underlying agreements that served as their basis, and prevent subsequent requesting carriers from obtaining those same terms. Not only

does GTE's request violate the express provisions of Section 252(i), but is discriminatory on its face in violation of Section 202(a) of the Act.

GTE also seeks a determination that CLECs are not entitled to tandem switching rates but rather only end office rates, a position that has already been considered and rejected by the Commission. In addition, GTE requests a declaratory ruling that CLECs are entitled to neither the end office nor tandem switching rate unless CLECs perform circuit switching. The Commission's rules require that compensation for local call termination be mutual and symmetrical. GTE's stance on compensation for switching, which once again stands in direct violation to the Commission's rules, is really just another attempt to circumvent decisions adverse to it regarding reciprocal compensation for ISP traffic. Once GTE's argument that CLECs cannot opt-in to the terms of underlying agreements fails, as it certainly must, GTE will attempt to force CLECs to accept lower switching rates, thereby reducing reciprocal compensation payments.

GTE's true objective is to continue to delay CLECs from obtaining the agreements to which they are statutorily entitled. For this reason, the Commission should deny GTE's request to hold the numerous complaints against it in abeyance and consider its request for relief in this proceeding as a part of the ongoing docket regarding compensation for ISP Traffic. Such a decision would only serve GTE's goal of delay, and would impede CLEC market entry and the development of local exchange competition.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request for	)	
	)	
Declaratory Ruling Regarding	)	CC Docket No. 99-143
the Use of Section 252(i) to Opt Into	)	
Provisions Containing	)	
Non-Cost-Based Rates	)	

JOINT COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, CHOICE ONE COMMUNICATIONS INC., FOCAL COMMUNICATIONS CORPORATION AND HYPERION TELECOMMUNICATIONS, INC.

The Association for Local Telecommunications Services, Choice One Communications Inc., Focal Communications Corporation, and Hyperion Telecommunications, Inc. (collectively "Joint Commenters"), by their counsel, and pursuant to the Commission's May 6, 1999, Public Notice in the above-captioned proceeding, hereby submit these Joint Comments opposing GTE Service Corporation's ("GTE") request for a declaratory ruling in this proceeding.

INTRODUCTION

Since the first interconnection agreements were approved under the Act, GTE and other incumbent LECs have taken every opportunity to hinder, delay, or even deny CLECs the ability to obtain the rates, terms and conditions contained in previously approved interconnection agreements, as CLECs are statutorily entitled to under Section 252(i). Incumbents have delayed some CLECs by as much as nine months in their attempts to opt-in to previously approved agreements, which is equal to the time limit for state commission consideration of a fully negotiated and arbitrated agreement. In enacting Section 252(i), Congress intended to "make interconnection more efficient

by making available to other carriers the individual elements of agreements that have been previously negotiated."[1/] This Commission envisioned that Section 252(i) would serve to enable CLECs to obtain agreements on "an expedited basis," thereby furthering "Congress's stated goals of opening local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms . . . as quickly and efficiently as possible." *Local Competition Order* at ¶ 1321.

Incumbent LECs have made the Section 252(i) opt-in process anything but the streamlined market entry strategy envisioned by Congress and the Commission. Rather, incumbent LECs have used the opt-in process as an opportunity to impose onerous terms and conditions on CLECs. GTE, which is not motivated by the "carrot-and-stick" incentives of Section 271 of the Act, has engaged in particularly egregious conduct. Recently, GTE and other incumbent LECs have insisted that CLECs sign letter agreements waiving many of the terms and conditions contained in underlying agreements before permitting CLECs to opt-in to those agreements. CLECs have been forced either to capitulate to incumbent LEC demands, or engage in lengthy complaint proceedings that severely delay their market entry. Attached hereto as Exhibit A is a copy of GTE's standard opt-in letter, in which it attempts to condition a CLEC's adoption of an approved interconnection agreement on five pages of onerous new terms. Through its Petition in this proceeding, GTE now seeks to eliminate

---

1/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶618 (1996) (*"Local Competition Order"*), *rev'd in part and aff'd in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1996), *rev'd in part, aff'd in part, and remanded sub nom., AT&T Corp. v. Iowa Utilities Board*, 19 S. Ct. 721 (1999).

completely CLEC opt-in rights, requesting that the Commission ignore the express language of Section 252(i), and determine that incumbent LECs need not make available the terms of previously approved interconnection agreements to requesting CLECs. GTE's request in this proceeding cannot be reconciled with the plain language of the Act, and accordingly must be rejected.

I. Requesting Carriers Have an Absolute Right to the Rates, Terms, and Conditions of Previously Approved Interconnection Agreements Under Section 252(i)

The scope of GTE's request for relief in this proceeding is unclear, as it seeks a determination that CLECs cannot opt-in to "provisions of interconnection agreements where the cost or rate element in a provision is no longer cost-based." *GTE Petition* at 1. Regardless of what this means, it is apparent that GTE seeks to prevent requesting carriers from obtaining the same terms as those contained in previously approved interconnection agreements, a position that is untenable in view of Section 252(i). The language of Section 252(i) is clear and unambiguous, stating that incumbent LECs "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). Any debate over the meaning of this provision was foreclosed recently by the U.S. Supreme Court when it upheld the Commission's interpretation of Section 252(i) as a "pick-and-choose" provision.[2/] In addition, the U.S. District Court for the Northern District of California

---

2/ *AT&T Corp. v. Iowa Utilities Board*, 19 S. Ct. 721 (1999).

recently ruled that under Section 252(i), incumbent LECs are "required to provide [CLECs] with an interconnection agreement that contains identical terms" as the underlying agreement.[3/]

Numerous state commissions have also considered and rejected attempts by incumbent LECs to deny requesting CLECs the terms and conditions contained in approved interconnection agreements. The Maryland and Delaware Public Service Commissions have upheld a CLEC's right to opt-in to voluntarily negotiated rates in an underlying agreement, even though those rates differed from the rates subsequently allowed to go into effect by those Commissions.[4/] The Illinois Commission affirmed that, contrary to the incumbent LEC's "claim, the Federal Act does not preclude carriers from adopting the reciprocal compensation provisions of an agreement that has already been approved by this Commission. Reciprocal compensation provisions are 'terms and conditions' of interconnection and are therefore part of the agreement that can be adopted under Section 252(i)."[5/] Similarly, the New Hampshire Commission recently held that "[w]e agree . . . that

---

[3/] *Airtouch Paging of California v. Pacific Bell*, Memorandum and Order, No. C.-98-2216 MHP at 16 (N.D. Cal. May 10, 1999).

[4/] *Starpower Communications, LLC's Petition for Commission Determination of Rates*, Order, ML Nos. 62554, 62269, 62639, and 62703 (MD. P.S.C. Sep. 14, 1998) ("Maryland Decision"); *Joint Application of Bell Atlantic-Delaware, Inc. and Focal Communications Corporation of Pennsylvania for Approval of an Interconnection Agreement Pursuant to Section 252(e) of the Telecommunications Act of 1996*, PSC Docket No. 98-275; *Complaint Filed by Focal Communications Corporation of Pennsylvania for Relief Against Bell Atlantic - Delaware, Inc. for Violating Section 252(i) of the Telecommunications Act of 1996*, Order No. 4959 (DE. P.S.C. Dec. 1, 1999) ("Delaware Decision").

[5/] *QST Communications, Inc. v. Ameritech Illinois, Complaint Pursuant to Sections 10-108 and 13-514 of the Public Utilities Act for Ameritech's Refusal to Execute an Interconnection Agreement with QST Upon the Same Terms and Conditions as Between Ameritech and MCImetro Access Transmission Services, Inc.*, 1998 Lexis 986 (Ill. P.U.C. Nov. 5, 1998).

§ 252(i) unconditionally permits a Competitive Local Exchange Carrier (CLEC) to adopt an approved interconnection agreement without modification . . . . Refusal to allow other CLECs to adopt an existing interconnection agreement in its entirety is a violation of section 252(i) of the Act."[6/] The Michigan Commission, faced with similar incumbent LEC arguments, concluded that "[a] more natural reading is that Section 252(i) applies to the terms and conditions of an approved interconnection agreement without exception, including reciprocal compensation."[7/] This string of decisions demonstrates that both federal courts and state commissions have thoughtfully considered the arguments raised by GTE in this proceeding, and have consistently rejected them. Having lost at virtually every level, GTE now seeks a new forum to revisit these issues.

By paraphrasing Section 51.809 of the Commission's Rules, GTE makes it appear that Section 51.809 supports the position it has taken in this proceeding, when in fact it stands for no such proposition. Section 51.809 was designed to prevent precisely the sort of discrimination that GTE is attempting to engage in here, and establishes an extremely limited exception to Section 252(i)'s prescriptions where the incumbent LEC can demonstrate to a state commission that the cost of making a specific term available to a requesting carrier are greater than the costs of providing it to the original carrier, or where making the term available to a requesting carrier is not technically feasible. 47 C.F.R. § 51.809(b). Although GTE references the Commission's rules as a basis for

---

6/ *Sprint Communications Company LP*, Order Supporting Petition, DE 98-211, Order No. 23,111 (N.H. P.U.C. Jan. 25, 1999).

7/ *In the matter of the application of Nextlink Michigan, Inc., for arbitration of an interconnection agreement with Ameritech Michigan pursuant to 47 USC 252*, Case No. U-11839 (MI. P.S.C. Feb. 17, 1999).

its Petition, GTE has not alleged, and certainly has not demonstrated, that either of these conditions are present with respect to any specific interconnection, service or network element.[8/] Moreover, by filing its Petition with the Commission, GTE has purposely sought to avoid raising these issues before the state commissions as required by Section 51.809(b), since each state commission that has considered this issue has rejected GTE's position.

Not only would grant of GTE's Petition stand in blatant violation of the language of Section 252(i) of the Act, but it would also violate the nondiscrimination duty of Section 202(a), as certain CLECs who first entered the market and expended the resources to negotiate their own agreements would receive one rate, while others would not be entitled to obtain those same rates.

II. GTE's Petition is Really an Attempt to Undermine State Decisions Regarding Reciprocal Compensation for ISP Traffic

GTE's request for relief in this proceeding is a transparent attempt to circumvent numerous state decisions requiring payment of reciprocal compensation for ISP traffic, and to discriminate against subsequent carriers who wish to opt-in to the underlying agreements that served as the basis for those decisions. Thirty one (31) state commissions have considered the issue of CLEC rights to receive compensation for Internet bound traffic, and each has decided that reciprocal compensation should be paid for such traffic under existing interconnection agreements. On February 26, 1999,

---

[8/] GTE argues that the Commission's rule provides that incumbent LECs are not required to make available provisions of interconnection agreements that are no longer cost-based. Of course, that is not what the limited exception provides. Rather, it provides that if the incumbent LEC proves to the state commission that the costs to the requesting CLEC are greater than to the original CLEC, then Section 252(i) does not apply. There has been no such showing here. In effect, GTE is asking for a major modification to the Commission's rules.

this Commission released an order concluding, among other things, that ISP traffic is "jurisdictionally mixed and appears to be largely interstate."[9/] In making this determination, however, the Commission acknowledged that no federal rule existed as to whether reciprocal compensation should be paid for such traffic, and specifically left in place the unanimous state commission decisions interpreting interconnection agreements as requiring compensation for ISP traffic. The Commission also made it clear that until it adopts a federal rule, state commissions could appropriately continue to find that reciprocal compensation is owed since the traffic has been treated as local traffic. Since that time, several state commissions have determined that such compensation is owed, and several have rejected attempts by incumbent LECs to reconsider their previous decisions.[10/]

Although GTE styled its Petition as a request for a declaration that CLECs cannot opt-in to provisions in agreements that are "no longer cost-based," the Petition is actually a blatant attempt to circumvent the state decisions discussed above, and prevent requesting carriers from opting-in to the reciprocal compensation provisions contained in approved interconnection agreements. GTE appears willing to concede that reciprocal compensation must be paid on the original agreements it negotiated. However, GTE seeks to prevent any subsequent CLEC from obtaining those same terms.

9/ *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (rel. Feb. 26, 1999) ("ISP Traffic Decision").

10/ *See e.g., Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation,* Order Instituting Proceeding to Reexamine Reciprocal Compensation, Case 99-C-0529 (N.Y.P.S.C. Apr. 15, 1999) ("ISP Traffic Proceeding").

GTE's only real objective here is delay, as its requested relief cannot be reconciled with the Act. Section 252(i) states that incumbent LECs shall make available any term in an approved agreement "*to any other requesting carrier upon the same terms and conditions as those provided in the agreement.*" 47 U.S.C. § 252(i) (emphasis added). It makes no provision for reexamining the terms of approved interconnection agreements to determine whether subsequent carriers should be able to obtain them -- it provides CLECs an absolute right to those terms.[11/] Section 252(i) was designed to prevent discrimination, enabling new entrants to obtain favorable terms where they otherwise may not be able to. GTE's proposal would deny carriers that right. Furthermore, while GTE purports to limit its request to certain rates that are "no longer cost-based," it is utterly silent as to how CLECs may avoid the invariable slippery slope of other rates and terms that GTE will undoubtedly deem no longer valid and thus unavailable for opt-in. Indeed, if the reasoning in GTE's Petition were accepted, GTE would certainly use the precedent to preclude CLECs from opting-in to a host of other terms.

GTE's proposal also contravenes Section 252(a), which expressly provides that interconnection agreements need not comply with the particular requirements of subsections 251(b) or (c). Under GTE's reasoning, even if an underlying carrier freely negotiates rates and terms that vary from the requirements of the Act, subsequent carriers may not obtain such terms based on the ILEC's assertion that the rates are not cost-based or current. In providing that agreements need not

---

[11/] And as explained in Footnote 8, above, the very limited exceptions contained in the Commission's Rules are not applicable here.

comply with Sections 251(b) and (c), Congress clearly anticipated that there would exist interconnection agreements that would contain rates, terms and conditions that may not reflect the latest pronouncement on a given issue. Congress' awareness of such agreements is significant, because Congress could have limited the "pick-and-choose" requirement of subsection 252(i) to only those agreements found to be compliant with the requirements of subsections 251(b) and (c). Similarly, it could have prohibited application of "pick-and-choose" in situations where states or the Commission had subsequently altered their interpretation of those requirements, thereby effectively "grandfathering" the original agreements and limiting their application to the original parties. Congress took neither of these steps. Instead, Congress focused on preventing any discrimination whatsoever among new entrants when it adopted subsection 252(i). Section 252(i) does not distinguish between agreements that comply with subsections 251(b) and (c) and those that do not, nor is it contingent on subsequent state or federal policy. All approved interconnection agreements are fully subject to this provision.

III. GTE's Argument Regarding CLEC Switching Rates is Confusing and Appears to Be Yet Another Frivolous Collateral Attack on CLECs Right to Reciprocal Compensation for ISP Traffic

In its Petition, GTE sets forth a confusing argument which appears to seek a declaratory ruling that CLECs cannot opt-in to certain switching rates contained in approved agreements.[12/] At first it seems that GTE is seeking a determination that CLECs are not entitled to tandem switching rates but rather only end office rates, a position that has already been considered and rejected by the Commission. Then, without any logical segue, GTE launches an attack against the costs associated with circuit switching versus other forms of switching, arguing that CLECs should not be entitled to either tandem or end-office switching rates unless a call is circuit switched. In support of this astounding conclusion, GTE cites "media descriptions" as cost support. *GTE Petition* at 8.

With respect to the first contention, the Commission has already determined that "[w]here an interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate [rate] for the interconnecting carrier's additional costs is the LEC tandem interconnection rate." *Local Competition Order* at ¶ 1090. Moreover, as GTE itself notes, several state commissions have specifically determined in arbitration proceedings that the CLEC at issue was entitled to receive the tandem switching rate given the areas the CLEC switch serves. *GTE Petition* at 7. Where underlying agreements contain separate rates for end office and tandem switching, the geographic area served by the opting-in carrier's switch will determine

---

[12/] Compensation for transport and termination of ISP traffic is one of the issues being considered in the ISP Traffic Decision Notice of Proposed Rulemaking, and is not properly raised here.

how that carrier's switch will be treated for compensation purposes. In those instances where a single, composite switching rate has been negotiated, the opting-in carrier is entitled to that rate, just like the underlying carrier. In short, GTE's request for a sweeping declaratory ruling that no CLEC switches are entitled to tandem treatment is unsupported by the facts, and defies the Commission's ruling on precisely this issue in the *Local Competition Order*.

GTE's second contention is tantamount to a claim that certain CLEC switching rates are not justifiable. The proper forum for consideration of such a contention would be an arbitration proceeding under Section 252(b) of the Act, or in a state rate proceeding. The strict evidentiary and legal standards of either of these processes would require far more from GTE to meet its burden than the unsupported assertions that GTE has made in this proceeding. Moreover, the Commission cannot resolve the lawfulness of a particular carrier's rates without making carrier-specific factual determinations, which cannot be done in a declaratory ruling.[13/]

Even if the Commission were to consider GTE's absurd argument that CLECs are not entitled to either the end office or tandem switching rate, this contention must certainly be rejected. The Commission's rules explicitly state that the "[r]ates for transport and termination of local telecommunications traffic shall be symmetrical . . ." 47 C.F.R. § 51.711. Thus, any switching rate established for incumbent LECs would apply equally and symmetrically to CLECs. The only

---

13/ *See e.g. Access Charge Reform Order*, First Report and Order, 12 FCC Red 15982, ¶ 363 (1997), *aff'd, Southwestern Bell Telephone Company v. FCC*, 153 F.3d 520 (8th Cir. 1998); *Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corp.*, File No. E-98-39, Memorandum Opinion and Order, FCC 98-297, ¶ 7 (rel. Nov. 10, 1998).

exception to this rule benefits CLECs. The crux of GTE's argument is that compensation for the transport and termination of local traffic should not be symmetrical, and that GTE should be entitled to payment for local switching, while CLECs should not. This argument flies in the face of Section 51.711 of the Commission's rules, which GTE seems to ignore. Moreover, states have conducted lengthy cost proceedings to determine the appropriate switching rates for their states, and have appropriately applied such rates to incumbent LECs and CLECs alike, as required by the Commission's rules. GTE is essentially seeking to overturn all of those decisions with its sweeping request for relief in this proceeding, rather than pursue appropriate remedies in state arbitration or rate proceedings. GTE's unsupported belief that different rates should be adopted for different forms of switching cannot be resolved through a declaratory ruling, and violates the express mandates of the Commission's rules.

IV. The Commission Should Put a Stop to Incumbent LEC Delay Tactics

GTE's motivations for taking the untenable positions it has taken in this proceeding are clear – GTE is attempting to degrade CLECs' ability to receive reciprocal compensation for ISP traffic. Once GTE's argument that CLECs cannot opt-in to the rates contained in previous agreements fails, as it certainly must, GTE will attempt to force CLECs to accept lower switching rates, thereby reducing reciprocal compensation payments. The Commission should put an end to GTE's and other incumbent LECs' endless attacks on the payment of reciprocal compensation for ISP traffic. In addition, the Commission should summarily reject GTE's request that the Commission hold the numerous complaints against it in abeyance until this proceeding is resolved, and to consider the

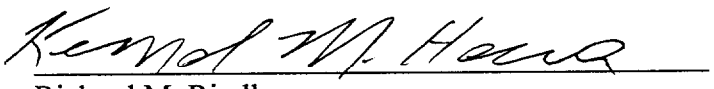
issues it raises here as a part of the ISP Traffic Proceeding. Such a decision would only serve GTE's objective of delay, thereby leaving CLECs without the interconnection agreements to which they are entitled, and further impeding the development of local exchange competition.

GTE has and apparently will continue to blatantly violate Section 252(i) and deny requesting carriers their statutory right to obtain the terms of previously approved interconnection agreements. GTE is well aware that speed to market is the single most important factor for a new entrant into the telecommunications market. GTE has leveraged its knowledge of this fact to force CLECs to accept terms not contained in underlying agreements, or waive terms that are, as a condition of GTE "permitting" CLECs to opt-in to such agreements. The Commission has the authority to and should declare that under Section 252(i) of the Act, CLECs have an absolute and unequivocal right to obtain the rates, terms and conditions contained in previously approved interconnection agreements, which cannot be compromised by any subsequent views incumbent LECs may have on those terms.

Conclusion

For the foregoing reasons, Joint Commenters urge the Commission to deny GTE's Petition for a Declaratory Ruling in this proceeding.

Respectfully submitted,



Richard M. Rindler
Kemal M. Hawa
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007-5116
(202) 424-7500 (phone)
(202) 424-7645 (fax)

Counsel for Joint Commenters

Emily M. Williams, Esq.
Association for Local
Telecommunications Services
888 17th Street, N.W. Suite 900
Washington, D.C. 20006
(202) 969-2587

Kim R. Scovill, Esq.
Choice One Communications Inc.
1 Marine Midland Plaza
100 Chestnut Street, Suite 700
Rochester, NY 14604-2417
(716) 530-2665

Richard Metzger
Focal Communications Corporation
1120 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 293-0142

Janet S. Livengood, Esq.
Hyperion Telecommunications, Inc.
DDI Plaza Two
500 Thomas St., Suite 400
Bridgeville, PA 15017

EXHIBIT A

Connie Nicholas
Assistant Vice President
Wholesale Markets-Interconnection

GTE Network Services

HQE03B28
600 Hidden Ridge
P.O. Box 152092
Irving, TX 75038
972/718-4566
FAX 972/718-1523

April 14, 1999

Mr. Marc Wolens
President
Essex Telecom, Inc.
2 East 3rd Street
Sterling, Illinois 61081

Dear Mr. Wolens:

We have received your letter stating that, under Section 252(i) of the Telecommunications Act of 1996, you wish to adopt the terms of the Interconnection Agreement between US Xchange and GTE that was approved by the Commission as an effective agreement in the State of Illinois in Docket No. 98-NA-042 (Terms)[1]. The terms provide for the election by US Xchange of certain additional provisions from a GTE arbitrated agreement ("Arbitrated Provisions"). I understand you have a copy of the Terms.

Please be advised that our position regarding the adoption of the Terms is as follows.

On January 25, 1999, the Supreme Court of the United States issued its decision on the appeals of the Eighth Circuit's decision in *Iowa Utilities Board*. Specifically, the Supreme Court vacated Rule 51.319 of the FCC's First Report and Order, FCC 96-325, 61 Fed. Reg. 45476 (1996) and modified several of the FCC's and the Eighth Circuit's rulings regarding unbundled network elements and pricing requirements under the Act. *AT&T Corp. v. Iowa Utilities Board*, No. 97-826, 1999 U.S. LEXIS 903 (1999).

Three aspects of the Court's decision are worth noting. First, the Court upheld on statutory grounds the FCC's jurisdiction to establish rules implementing the pricing provisions of the Act. The Court, though, did not address the substantive validity of the FCC's pricing rules. This issue will be decided by the Eighth Circuit on remand.

1 *These "agreements" are not agreements in the generally accepted understanding of that term. GTE was required to accept these agreements, which were required to reflect the then-effective FCC rules.

Second, the Court held that the FCC, in requiring ILECs to make available all UNEs, had failed to implement section 251(d)(2) of the Act, which requires the FCC to apply a "necessary" or "impair" standard in determining the network elements ILECs must unbundle. The Court ruled that the FCC had improperly failed to consider the availability of alternatives outside the ILEC's network and had improperly assumed that a mere increase in cost or decrease in quality would suffice to require that the ILEC provide the UNE. The Court therefore vacated in its entirety the FCC rule setting forth the UNEs that the ILEC is to provide. The FCC must now promulgate new UNE rules that comply with the Act. As a result, any provisions in the Agreement requiring GTE to provide UNEs are nullified.

Third, the Court upheld the FCC rule forbidding ILECs from separating elements that are already combined (Rule 315(b)), but explained that its remand of Rule 319 "may render the incumbents' concern on [sham unbundling] academic." In other words, the Court recognized that ILEC concerns over UNE platforms could be mooted if ILECs are not required to provide all network elements: "If the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network."

The Agreement which Essex seeks to adopt does *not* reflect the Court's decision, and any provision in the Agreement that is inconsistent with the decision is nullified.

GTE anticipates that after the FCC issues new final rules on UNEs, this matter may be resolved. In the interim, GTE would prefer not to engage in the arduous task of reforming agreements to properly reflect the current status of the law and then to repeat the same process later after the new FCC rules are in place. Without waiving any rights, GTE proposes that the parties agree to hold off amending (or incorporating the impact of the decision into) the Agreement and let the section 252(i) adoption proceed by maintaining the status quo until final new FCC rules are implemented (the "New Rules"), subject to the following package of interdependent terms:

1. GTE will continue to provide all UNEs called for under the Agreement until the FCC issues the New Rules even though it is not legally obligated to do so.

2. Likewise, [CLEC] agrees not to seek UNE "platforms," or "already bundled" combinations of UNEs.

3. If the FCC does not issue New Rules prior to the expiration of the initial term of the Agreement, GTE will agree to extend to any new interconnection arrangement between the parties to the terms of this proposal until the FCC issues its New Rules.

4. By making this proposal (and by agreeing to any settlement or contract modifications that reflect this proposal), GTE does not waive any of its rights, including its rights to seek recovery of its actual costs and a sufficient, explicit universal service fund. Nor does GTE waive its position that, under the Court's decision, it is not required to provide UNEs unconditionally. Moreover, GTE does not agree that the UNE rates set forth in any agreement are just and reasonable and in accordance with the requirements of sections 251 and 252 of Title 47 of the United States Code.

5. The provisions of the contract that might be interpreted to require reciprocal compensation from GTE to the CLEC for the delivery of traffic to the Internet are not available for adoption and are not a part of the 252(i) agreement pursuant to FCC Rule 809 and paragraphs1317 and 1318 of the First Report and Order.

GTE believes that the first four conditions above are adequately explained by the first part of this letter. The reason for the last condition is the FCC gave the ILECs the ability to except 252(i) adoptions in those instances where the cost of providing the service to the requesting carrier is higher than that incurred to serve the initial carrier or there is a technical incompatibility issue. The issue of reciprocal compensation for traffic destined for the Internet falls within FCC Rule 809. GTE never intended for Internet traffic passing through a CLEC to be included within the definition of local traffic and the corresponding obligation of reciprocal compensation. Despite the foregoing, some forums have interpreted the issue to require reciprocal compensation to be paid. This produces the situation where the cost of providing the service is not cost based under Rule 809 or paragraph 1318 of the First report and Order. As a result, that portion of the contract pertaining to reciprocal compensation is not available under this 252(i) adoption. In its place are provisions that exclude ISP Traffic from reciprocal compensation. Specifically, the definition of "Local Traffic" includes this provision: "Local Traffic excludes information service provider ("ISP") traffic (i.e., Internet, 900 – 976, etc)".

In sum, GTE's proposal as described above would maintain the status quo until the legal landscape is settled.

Essex's adoption of the US Xchange agreement shall become effective upon filing of this letter with the Illinois Commerce Commission and remain in effect no longer than the date the US Xchange agreement is terminated.

As these Terms are being adopted by you pursuant to your statutory rights under section 252(i), GTE does not provide the Terms to you as either a voluntary or negotiated agreement. The filing and performance by GTE of the Terms does not in any way constitute a waiver by GTE of its position as to the illegality or unreasonableness of certain Arbitrated Provisions or a portion thereof, nor does it constitute a waiver by GTE of all rights and remedies it may have to seek review of the Arbitrated Provisions, or to petition the Commission, other administrative body, or court for reconsideration or reversal of any determination made by the Commission pursuant with respect to the Arbitrated Provisions, or to seek review in any way of any provisions included in these Terms as a result of Essex's 252(i) election.

Nothing herein shall be construed as or is intended to be a concession or admission by either GTE or Essex that any Arbitrated Provisions comply with the rights and duties imposed by the Telecommunications Act of 1996, the decision of the FCC and the Commissions, the decisions of the courts, or other law, and both GTE and Essex expressly reserve their full right to assert and pursue claims arising from or related to the Arbitrated Provisions. GTE contends that certain provisions of the Terms may be void or unenforceable as a result of the Supreme Court's decision of January 25, 1999 and the remand of the pricing rules to the United States Eighth Circuit Court of Appeals.

Should Essex attempt to apply such conflicting provisions, GTE reserves its rights to seek appropriate legal and/or equitable relief. Should any provision of the Terms be modified, such modification would likewise automatically apply to this 252(i) adoption.

Please indicate by your countersignature on this letter your understanding of and commitment to the following three points:

(A) Essex adopts the Terms of the US Xchange agreement for interconnection with GTE and in applying the Terms, agrees that Essex be substituted in place of US Xchange in the Terms wherever appropriate.

(B) Essex requests that notice to Essex as may be required under the Terms shall be provided as follows:

To : Essex Telecom
Attention: Mr. Marc Wolens, President
2 East 3rd Street
Sterling, Illinois 61081
Telephone number: 815/625-8893
FAX number: 815/625-8894

With copies to:

Tamra Burgwardt
TJB Telecom Consultants
3702 Stonewall Circle
Atlanta, GA 30339

Page 5

(C) Essex represents and warrants that it is a certified provider of local dialtone service in the State of Illinois, and that its adoption of the Terms will cover services in the State of Illinois only.

Sincerely,

GTE North Incorporated
GTE South Incorporated

_____

Connie Nicholas
Assistant Vice President
Wholesale Markets-Interconnection

Reviewed and countersigned as to points A, B, and C:

Essex Telecom

_____

Mr. Marc Wolens

c: R. Ragsdale - HQE03B75 - Irving, TX
R. Vogelzang - HQE03J41 - Irving, TX

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 1999, copies of Joint Comments of The Association of Local Telecommunications Services, Choice One Communications Inc., Focal Communications Corporation and Hyperion Telecommunications, Inc. were served by first class mail or hand delivery on the following:

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-C327
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Gregory J. Vogt
Suzanne Yelen
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Thomas Parker
GTE Service Corporation
600 Hidden Ridge, MS HQ-E03J43
P. O. Box 152092
Irving, Texas 75015-2092

Alma R. Myers